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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HARRY TAYLOR, Plaintiff and Appellant, v. WILLIAM R. SUSSMAN, Defendant and Respondent.	D043522 (Super. Ct. No. GIC801114)

APPEAL from a judgment of the Superior Court of San Diego County, Linda B. Quinn, Judge. Affirmed.

Plaintiff Harry Taylor purchased a restaurant from T. P. Breweries, Inc. (T. P. Breweries). Defendant William R. Sussman was the president and principal shareholder of T. P. Breweries. The purchase agreement between Taylor and T. P. Breweries included a covenant not to compete.

Taylor filed a complaint against Sussman in which he alleged that Sussman violated the covenant not to compete. The trial court found Sussman was not personally

liable under the terms of the purchase agreement and that in any event Taylor had not pled the occurrence of any damage.

We affirm. Although the parties could have expressed some mutual understanding that Sussman would be personally liable under the purchase agreement, they did not. Accordingly, we must apply the general rule that officers and shareholders are not personally liable for contracts entered into solely by corporations they own or control.

FACTUAL AND PROCEDURAL BACKGROUND

T. P. Breweries opened the Terrific Pacific Brewery & Grill in Pacific Beach in 1995. The restaurant catered to the beach community, offering appetizers, sandwiches, burgers, All-You-Can-Eat crab and other entrees. On September 10, 2001, Taylor purchased the restaurant from T. P. Breweries and renamed it Taylor's Restaurant & Brewery. Taylor added a few items to the menu but maintained the staff and ambiance of the restaurant.

The purchase agreement between T. P. Breweries and Taylor allocated $200,000 of the $535,000 purchase price to goodwill and $10,000 to a covenant not to compete. The form contract the parties used identified Taylor as "BUYERS" [sic] and T. P. Breweries Inc. as "SELLERS" [sic]. The covenant provided:

"SELLER agrees that they [sic] shall not and will not, for a period of 3 consecutive years from close of this escrow, directly or indirectly, engage in a like business, within a radius of 10 miles of the business being sold, provided that BUYER is not in default under any terms of the Agreement; nor aid or assist anyone else, except the

BUYER, to do so within these limits; nor have any interest directly or indirectly, in such business, excepting as an employee of the BUYER."

In August 2002 Sussman told Taylor that he was planning to open a restaurant in the Gaslamp Quarter of San Diego, which was within the area protected by the covenant not to compete. According to Taylor, he had no objection to a new restaurant within the protected area so long as Sussman did not hire any of Taylor's employees.

On September 19, 2002, Taylor's chef submitted his resignation and told Taylor that he was going to work for Sussman at Sussman's new restaurant. Taylor then objected to the new restaurant.

The new restaurant was in fact opened not by Sussman, but by the successor to T. P. Breweries, Kalahari Café, Inc. Sussman is the president of Kalahari Café, Inc.

After mediation failed, Taylor filed a complaint in which Sussman was the only named defendant. Notwithstanding Taylor's apparent knowledge of the existence of T. P. Breweries and its successor, Kalahari Cafe, Inc., Taylor did not name them as defendants and did not allege that Sussman was the alter ego of either corporation.

Taylor applied for a preliminary injunction, which was denied. In denying the application the court found the Kalahari Café and Taylor’s Restaurant & Brewery were not like businesses and the $10,000 covenant provided an adequate remedy at law.

The dispute proceeded to trial. Sussman filed limine motions to have the dispute arbitrated, all evidence against him excluded because he was not a party to the purchase agreement and all evidence of damages excluded as not pled. After oral argument, the

trial court found Sussman had waived the right to arbitration but granted his remaining motions and entered judgment in his favor.

Taylor filed a timely notice of appeal.

DISCUSSION

I

Standard Of Review

Motions in limine are ordinarily directed at particular items of evidence, rather than at a plaintiff's entire case. Here, Sussman's motions were not directed to particular items, but rather sought to exclude all evidence against him and all evidence of damages. Thus, Sussman's in limine motions were tantamount to motions for judgment on the pleadings, nonsuit or demurrers to the evidence. (See *Edwards v. Centex Real Estate Corp*. (1997) 53 Cal.App.4th 15, 26-27.) As the court in *Edwards v. Centex Real Estate Corp* explained: "Both a demurrer and a motion for judgment on the pleadings accept as true all material factual allegations of the challenged pleading, unless contrary to law or to facts of which a court may take judicial notice. The sole issue is whether the complaint, as it stands, states a cause of action as a matter of law. [Citations.] The scope of a trial court's inquiry on a motion for nonsuit is similarly limited. A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the

evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor. [Citations.]

". . . . We are bound by the same rules as the trial court. Therefore, on this appeal we must view the evidence most favorably to appellants, resolving all presumptions, inferences and doubts in their favor, and uphold the judgment for respondents only if it was required as a matter of law. [Citations.]" (*Edwards v. Centex Real Estate Corp, supra,* 53 Cal.App.4th at pp. 27-28.)

II

Taylor contends that notwithstanding the fact Sussman was not a party to the purchase agreement, Sussman may still be held liable for breach of the covenant. We disagree.

"Contracts in restraint of trade are not favored in law beyond the extent to which they are authorized by statute and then the scope is not to be extended by a construction which imports into them a meaning which cannot be found in the language of the contract." (*California L. & S. Supplies v. Schultz* (1930) 105 Cal.App. 471, 474 (*California Linoleum*); see also *Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8.) Thus, only a signatory to a contract may be liable for any breach under California law. (*Gold v. Gibbons* (1960) 178 Cal.App.2d 517, 519; *Sessions v. Chrysler Corp.* (9th Cir. 1975) 517 F.2d 759, 760.) Additionally, "[t]he court will not disregard the corporate entity in order to bind a corporate officer to the covenant where there is no language in the contract permitting such a construction, and where the legitimate aim of the contract as disclosed by its language is not violated by the individual engaging in a similar

business." (44 Cal. Jur. 3d Monopolies, Etc., § 24; see also *California Linoleum*, *supra*, 105 Cal.App. at p. 474.)

In *California Linoleum*, the defendant owned and operated a corporation that sold its business to the plaintiff under a purchase agreement with a covenant that the selling company would not engage in a similar business in the same locality. After the sale, the plaintiff brought an action to enjoin the defendant who, individually, opened a similar competing business. The trial court found the selling corporation to be the alter ego of the defendant and therefore enjoined the defendant. (*California Linoleum*, *supra*, 105 Cal.App. at p. 473.) The Court of Appeal reversed, holding "[t]he legitimate aim and object of the contract as disclosed by its language has not been defeated or violated by the defendant engaging in a similar business as plaintiff and the court will not disregard the corporate entity as suggested by plaintiff to accomplish a purpose which the agreement does not show to have been within the intention of the parties." (*Id*. at p. 474.)

In this case, the purchase agreement was executed between Taylor and T. P. Breweries. Like the defendant in *California Linoleum*, Sussman signed the contract in his capacity as president of the corporation and it did not bind him personally. (*California Linoleum*, *supra*, 105 Cal.App. at p. 474.) As noted, the court will not expand the scope of a restrictive agreement by a construction that imports a meaning not found in the contract's language or disregard the corporate entity to accomplish a purpose the agreement does not show to have been within the signatories' intent. (*Ibid.*; see also *Tarter, Webster & Johnson, Inc. v. Windsor Developers, Inc.* (1963) 217 Cal.App.2d Supp. 875, 881 [court will not disregard corporate entity where to do so would promote

an injustice].) This record contains no evidence that the parties intended to make Sussman individually liable.

Contrary to Taylor's argument, Sussman was not a guarantor of anything more than his authority to act on behalf of the corporation in selling its assets.[1] Although the covenant contains the non sequitur "SELLER agrees that *they* shall not," this grammatical inconsistency does not support Taylor's contention the parties intended to bind more than T. P. Breweries. The only seller identified on the face of the contract was T. P. Breweries. In this regard we note that if the parties intended Sussman to be personally bound by the covenant, they could have quite easily made him a party to the contract. (See *Harvey Radio Laboratories, Inc. v. C.I.R.* (1972) 470 F.2d 118, 119.)

We also note that, unlike the defendant in *California L.& S. Supplies v. Schultz,* the defendant here did not in fact operate the business which allegedly breached the covenant not to compete. The record is undisputed that the new restaurant was operated by Kalahari Cafe, Inc. Thus Sussman was neither a party to the covenant nor the party

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1 The contract contained the following provision: "AUTHORITY: BUYER and SELLER have full power and authority to enter this agreement and to conclude the transaction described herein, and no contract or agreement to which either BUYER or SELLER is a party prevents either of them from concluding the transaction described herein, nor is the consent of any third party required thereof. If the SELLER is a corporation or partnership, the undersigned hereby guarantees performance hereunder and shall deliver a duly executed Corporate Resolution authorizing sale prior to closing." This provision cannot be interpreted as creating any personal liability on Taylor's part unless, in signing the sales agreement, he did not have authority to act on the corporation's behalf.

which arguably breached the covenant. Under these circumstances there is no basis upon which personal liability can be extended to Sussman.[2]

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.

[2] Because Sussman was not liable we do not reach the trial court's alternative finding that Taylor could not show the occurrence of any compensable damages.